

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASON BROWN, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
 :
CREATIVE COLLECTIONS, INC.,
Defendant NO. 01-2809

MEMORANDUM AND ORDER

McLaughlin, J.

June 7, 2002

This case presents the question **of** whether an agreement stating that a contractor will be held harmless for his actions "as long as all federal, state and local laws are observed" requires a party to defend and indemnify the contractor in a state action charging him with various intentional torts. When the defendant collection agency, Creative Collections **of** New York, Inc., rejected a demand for a defense and indemnification from the plaintiff contractor, Jason Brown, the plaintiff filed this action for declaratory judgment.

The Court finds that the collection agency had no duty to defend or indemnify the plaintiff. Public policy **of** the Commonwealth of Pennsylvania prohibits indemnification for intentional acts. Even absent such a policy, the facts as alleged in the underlying state complaint would constitute violations of state law, which are specifically excluded from

coverage. The Court will therefore grant the defendant's motion for summary judgment and will deny the plaintiff's motion for summary judgment.

I. Facts and Procedural History

On or about November 16, 1998, the defendant, Creative Collections of New York, Inc., ("CreativeCollections") entered into a written agreement with the plaintiff, Jason Brown, entitled "Hold Harmless and Authorization to Repossess" (the "Agreement"). The document reads, in relevant part, as follows:

HOLD HARMLESS AND AUTHORIZATION TO REPOSSESS

11/16/1998

...

Subject: Repossession for: Daniel Henderson

To Whom It May Concern:

This letter shall serve as your authorization to repossess, transport and hold: (1) 96 Peterbilt S/N 389683. This unit is being financed for Daniel Henderson and the account is presently in default.

Creative Collections will hold you harmless for any legal actions resulting from the repossession of this machine as long as all federal, state and local laws are observed. While in the act of repossession we request that you take the utmost care in avoiding damage to the [illegible].

...

Thank You,

James A. Bialous
President

Compl. Ex. B.

On December 14, 1998, the plaintiff repossessed Daniel Henderson's **1996** Peterbilt Truck, in Franklin County, Pennsylvania.

On March 5, 2001, Henderson filed a complaint in the Court of Common Pleas for Franklin County (the "state complaint"), alleging that Jason Brown, among others, is liable to pay damages for intentional infliction of emotional distress, 'false imprisonment, conversion, and assault, arising from the repossession. The state complaint alleges that Brown and/or other unidentified persons:

- "accosted" Henderson at gunpoint;
- 'wore bullet-proof vests marked 'Agent' and displayed what appeared to be police badges";
- "threatened to 'hurt' Henderson 'bad' if he did not follow their orders";
- pushed Henderson and searched him physically;
- warned him that "they would 'hurt him bad' if he had any weapons";
- "threatened to place Henderson under arrest";
- warned Henderson that "they were going to 'sic' an

¹ After adjudication of preliminary objections, the state court dismissed the claim for intentional infliction of emotional distress on October 3, 2001.

attack dog on him" if he moved; and

- "seized the [Peterbilt truck] and departed, without giving Henderson an opportunity to retrieve his personal possessions inside the vehicle."

Compl., Ex. A, at ¶ 25. Henderson also alleged that, despite "numerous requests", Brown "knowingly and willfully failed to release personal property belonging to Henderson located in the [truck at the time it was seized from him." Id. ¶ 25.

On or about May 15, 2001, Brown served a demand upon Creative Collections to provide him with a legal defense and to indemnify and hold him harmless for all **of** Henderson's claims arising out of the December 14, 1998 repossession. Pl. Mot. for Summ. J., Ex. C.

On June 1, 2001, an attorney for Creative Collections orally informed counsel for Brown that Creative Collections would neither indemnify Brown nor assume his defense in the Henderson case. A letter from counsel for Creative Collections explained that "[t]he allegations involving Mr. Brown, as set forth in the [state] complaint, are well beyond the scope of any action that Creative Collections authorized Mr. Brown to undertake on its behalf." Pl. Mot. for Summ. J., Ex. D.

On June 7, 2001, the plaintiff commenced this declaratory judgment action. The plaintiff seeks a declaration that Creative Collections is "obligated to provide Jason Brown

with indemnification, contribution and/or a legal defense" for the state suit, or any related action arising out of the December 14, 1998 repossession.

Both parties have filed motions for summary judgment.

II. Analysis

The parties agree that Pennsylvania law applies to this case. All of the events relating to the repossession took place in Pennsylvania. In determining the applicability of the duty to defend and indemnify, the Court looks to Pennsylvania liability insurance law.

An insurer's duty to defend an insured in litigation is broader than the duty to indemnify. Under Pennsylvania law, an insurer must defend an insured whenever the complaint filed by the injured party may potentially come within the policy's coverage. Pacific Indem. Co. v. Nationwide Mut. Fire Ins., 766 F.2d 754, 760 (3d Cir. 1995) (citing, inter alia, Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 58 (Pa. 1963)); Biborosch v. Transamerican Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1992). To determine if claims are covered, the Court compares the terms of the insurance to the nature of the allegations in the complaint. Gene's Restaurant v. Nationwide Ins. Co., 548 U.S. 246, 246-47 (Pa. 1988); 7C John Alan Appleman, Insurance Law and Practice § 4683, at 42, 50 (Berdal ed. 1979). The duty to defend

remains even if only some of the allegations are potentially covered, until the insurer confines the claim to a recovery that is not within the scope of the policy. Pacific Indem., 766 F.2d at 760; C. Raymond Davis & Sons v. Liberty Mut., 467 F. Supp. 17, 19 (E.D. Pa. 1979). If there is no duty to defend, there is no duty to indemnify.

Here, the Court need go no further than examining the state complaint. All of the remaining claims in that complaint are for intentional acts - false imprisonment, assault, and conversion. Pennsylvania has a "firmly established" public policy against providing insurance coverage for intentional acts. State Farm Auto. Ins. Co. v. Martin, 660 A.2d 66, 68 (Pa. Super. 1995) (citing Nationwide Mut. Ins. Co. v. Hassinger, 489 A.2d 171, 173 (Pa. Super. 1984)). Pennsylvania courts have therefore refused to require **an** insurer **to** defend an insured for the insured's own intentional torts or criminal acts. See Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. 1991) (citing Wilson v. Maryland Cas. Co., 105 A.2d 304 (Pa. 1954) and Esmond v. Liscio, 224 A.2d 793 (Pa. Super. 1966)). Because the plaintiff is not entitled to defense or indemnification pursuant to public policy, summary judgment is appropriate for the defendant, and against the plaintiff, irrespective of the terms

of the Agreement.'

Even in the absence of this public policy, the Court would find summary judgment appropriate for the defendant.

The language at issue in this case is the sentence in the Agreement stating that "Creative Collections will hold you harmless for any legal actions resulting from the repossession of this machine as long as all federal, state and local laws are observed" (emphasis added).

The defendant argues that the Agreement was intended to hold agents harmless for legal actions commenced against them resulting from unintentional or negligent harm they caused to a third party based on incorrect information provided by Creative Collections. Def. Summ. J. Mot., Ex. B. The plaintiff, on the other hand, argues that only violations of federal or state statutes or local ordinances are excluded from coverage.

Even accepting the plaintiff's proposed interpretation of the exclusionary language, the Court would still find the actions alleged in the state complaint ineligible for coverage as a matter of law. The plaintiff argues that, because the state complaint does not specifically reference any statutes or

² Whatever the parties intended for the Agreement language to mean, a contractual provision will not be upheld where it is contrary to a clearly expressed **public policy**. Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998) (citing Antanovich v. Allstate Ins. Co., 488 A.2d 571, 575 (Pa. 1985)).

ordinances, Creative Collections must indemnify and defend him.³

To determine whether one has an obligation to indemnify an insured, however, the Court looks to the factual allegations contained in the complaint, not the particular cause of action that an injured party pleads. Mutual Benefit Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa.1999). The fact that Henderson did not allege specific statutory or ordinance violations is therefore of no moment if the facts alleged in his complaint would constitute such violations. The Court examines each in turn.

False imprisonment is both an intentional tort and a crime in Pennsylvania. Under Pennsylvania criminal law, “[a] person commits an offense [of false imprisonment] if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.” 18 Pa. Cons. Stat. Ann. § 2903.

Henderson alleges in the state complaint that Brown,

³ The plaintiff also argues that the defendant must produce evidence of a criminal violation in order to meet its burden here, relying on Baal Corporation v. The Conn. Indem. Co., Civ. 00-571, 2001 WL 911358 (E.D. Pa. Aug. 13, 2001). Baal, however, does not stand for that proposition. In Baal, the court ruled that a hairdresser was not covered for a professional liability insurance policy where the policy required that the hairdresser be licensed, and his license had expired three years before the incident in question. The court also found that the hairdresser’s conceded failure to pay statutorily required fees triggered another policy exclusion, which denied coverage for any services rendered in violation of any law, rule, or regulation. Baal, 2001 WL 911358, at *3. The court did not state that evidence must be received before making a finding on liability; rather, that court had a concession in the record, and therefore it could look beyond the allegations of the underlying complaint.

while brandishing a firearm, wearing a vest that said "Agent" and a badge resembling a police officer's, ordered Henderson to exit his truck, made him spread-eagle, and warned him that if he moved, Brown would sic an attack dog on him. Henderson also alleges that Brown took these actions "in an intentional and unlawful effort to detain Henderson against his will." Compl. Ex. A, ¶ 33. The facts in the complaint, if taken as true, state a claim not just for the tort of false imprisonment, but also for the criminal offense of false imprisonment.

Theft occurs in Pennsylvania when a person "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof," 18 Pa. Cons. Stat. Ann. § 3921(a). Henderson alleges that Brown "seized the [t]ruck and departed, without giving Henderson an opportunity to retrieve his personal possessions inside the vehicle." Compl., Ex. A, ¶ 25. Henderson also alleges that "[d]espite numerous requests by Henderson and his counsel . . . [Brown] knowingly and willfully failed to release personal property belonging to Henderson located in the [t]ruck at the time it was seized from him," Id. ¶ 28. The state complaint also alleges that Brown took the actions "in an intentional effort to misappropriate Henderson's personal property and to deprive Henderson of the use and enjoyment thereof." Id. ¶ 36. These allegations state a claim for violation of criminal law regarding theft.

Finally, a person is guilty **of** simple assault in Pennsylvania "if he . . . attempts by physical menace **to** put another in fear of imminent serious bodily injury." 18 Pa. C.S.A. § 2701. Henderson alleges that Brown brandished a gun, threatened to badly hurt Henderson if he did not follow Brown's orders, pushed Henderson against the truck and searched him physically, and warned that he would be attacked by a dog. Henderson alleges that these actions constituted an intentional effort to place him in reasonable and imminent fear of harmful and offensive body contact. The Court finds that these allegations would state a claim under the criminal law.

The Court will therefore grant the defendant's motion for summary judgment, and deny the plaintiff's motion for summary judgment, because the public policy of this Commonwealth forbids indemnification for intentional torts, and, moreover, the acts alleged in the state complaint fall outside the coverage **of** the Agreement.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASON BROWN,
Plaintiff

CIVIL ACTION

v.

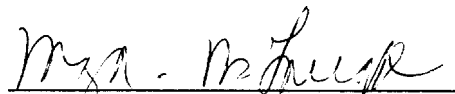
CREATIVE COLLECTIONS, INC.,
Defendant

NO. 01-2809

ORDER

AND NOW, this 1st day of June, 2002, upon consideration of the Motion by Defendant Creative Collections, Inc. for Summary Judgment Pursuant to Rule 56(c) (Docket No. **16**), the Motion by Plaintiff Jason Brown for Summary Judgment (Docket No. 17), and the responses thereto, IT **IS** HEREBY ORDERED THAT the defendant's motion is GRANTED and the plaintiff's motion is DENIED for the reasons stated in a memorandum of today's date. JUDGMENT is hereby ENTERED in favor of the defendant and against the plaintiff.

BY THE COURT:



Mary A. McLaughlin, J.